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Volume XIII.]

June, 1898.

[*Number 2.*

POLITICAL SCIENCE QUARTERLY.

PRIVATE CORPORATIONS FROM THE POINT OF VIEW OF POLITICAL SCIENCE.

ANY intelligent inquiry into the relations of private corporations to the fundamental principles of political science requires at the outset some idea, however rude and tentative, of what a private corporation is, from that point of view. In the prejudice of the masses, it is some alien monster, that has nothing in common with the people and lives upon the sacrifices which it imposes upon them — some Juggernaut, that mercilessly crushes the people to earth under the wheels of his terrible chariot — some Moloch, in whose fiery embrace men, women and children are ruthlessly consumed. In the mind of the better educated, it is commonly conceived of as a fictitious being, without soul or heart or blood — a being of cold and crafty intellect, inordinate ambition and unlimited selfishness. But all such prejudices and notions are crude, superficial and harmful. A private business corporation is, from the point of view of political science, a group of human beings, usually belonging to the best class of citizens, associated for the prosecution of some great enterprise and endowed with certain privileges and obligations. This is, I contend, the view of common sense and of sound political philosophy as to the nature of private business corporations ; and the law courts are beginning to manifest a tendency to make this conception the basis of their decisions — to make legal theory harmonize with political theory on this basis. They should have taken this

position long ago, not only for the sake of consistency in their decisions, but because the fiction theory to which they have clung tends to create a false impression, both of the nature of the thing and of its relations in every direction.

The chief privileges which these corporate associations usually enjoy are, continuity of existence despite changes in their individual membership, limited liability of the individual members, and the power to do business by majority act and majority representation.

With this rough and general concept of the nature and privileges of private corporations, we may, without inquiry at this point into the question of their obligations, proceed at once to consider their relations to the principles of a sound political science. Modern political science is a body of knowledge which is grouped about, and classified under, three fundamental doctrines: first, the theory and fact of sovereignty; second, the theory and fact of government; and, third, the theory and fact of liberty. Our question is, therefore, how the existence and activity of private corporations affect these theories and these facts.

In every modern political system there is, in theory, an original and ultimate power, which is the basis of all authority and of all liberty. It is called the sovereignty of the people, or of the nation, or of the state; but, in fact, this sovereignty is nowhere so fully, distinctly and independently organized as to exercise uniform and complete control over government. Almost everywhere sovereignty is legally organized either in the government, or in part of the government, or partly in the government, or makes use of the personnel or a part of the personnel of the government to construct a separate organization of its own. The people themselves are, in large states, unable to exercise their sovereignty over government directly, continuously and effectively. These facts may be easily established by a little study of the provisions and the practice as to amendment in the present political constitutions of the great states of the world. The tendency, in almost all of these states, is towards the assumption or acquirement of sovereignty by the govern-

ment. The individual citizen or subject is, in his isolation, powerless successfully to obstruct this tendency. The fact is that the political science of the modern world is still engaged in the task of working out the distinctions between sovereignty and government, and that political practice is in the transition period between the sovereignty of the government and the sovereignty of the people behind the government.

In such an era and under such conditions, associations of individuals, both for social and for economic purposes, are absolutely necessary in order to prevent government from assuming sovereignty and lapsing into despotism. Among all of these associations the private business corporation is the most effective. Government is far more likely to assert unlimited power over property than over life or personal liberty. On account of its economic *purpose* the private corporation is as natural a defender of property against the encroachments of the government as is the individual man himself; and on account of its *power*, it is a far more effective defender than the individual man. Every lawyer knows that a very large part, if not the larger part, of the immunities of property, or rather the immunities of men in respect to property, against the powers of government, have been established through the resistance of private corporations to governmental encroachments.

On the other hand, it is not only conceivable that private corporations may become dangerous to sovereignty, but it is a fact that something like private corporations did much to produce the anarchy of the Middle Ages. If associations, whether corporate or not, prosecute their interests through political means,—that is, undertake to get possession of the government, for the purpose of exercising force in behalf of their several economic interests,—they are then certainly threatening the sovereignty of the people. Danger from this source, to become real, however, would require such a consolidation or federalization of associations as would practically unite something like a majority of the political people in behalf of the economic interests of the combination—a situation which is practically impossible under modern conditions, unless pro-

duced, directly or indirectly, by government itself. Again, if associations, whether corporate or not, combine to resist the powers of government and of sovereignty, and undertake to acquire, by physical resistance, immunities not accorded them by the constitution of the state, they certainly array themselves against the sovereignty of the people ; but the success of any such movement is a possibility which may be practically disregarded under modern conditions, if the government only holds itself free from collusion.

On the whole, as things now stand in the modern states of the world, economic organizations, especially private corporations, are helpful in maintaining the sovereignty of the people against the almost inevitable tendencies of government to break over the limitations of the constitutions, placed upon government by the sovereign people in behalf of personal liberty and the security of property. The day has altogether passed when such combinations may, of themselves, become a real danger to sovereignty. The power of taxation, now firmly established over corporate property, is amply sufficient to overcome every hostile menace. Modern political science, therefore, regards with disapproval the political party organization of society upon the basis of the economic groups and combinations into which society may be divided, as tending to make economic interests the sole purpose of sovereignty and to obscure the principles of justice and morality ; on the other hand, political science sees great advantage to popular sovereignty in the existence of such economic groups and combinations, so long as they confine themselves to their proper business pursuits, and offer, through regular constitutional means, those same obstructions to governmental encroachment upon the security of private property, which are the chief objects of constitutional limitations upon governmental power.

From the point of view of government, private corporations must be distinguished under two general classes. The one class comprehends every corporation engaged in a business, which, either wholly or in part, is naturally a governmental function, or is actually a governmental function according to the politi-

cal system of the country in which the corporation exists. The other class comprehends corporations engaged in enterprises that are neither naturally nor actually governmental functions.

Considering this latter class first, we have only to say that, if government confers upon them any privilege above what is enjoyed by ordinary citizens in like pursuits, sound political science asserts the right and the duty of government to see that such privilege is not abused, to the injury of the public. Any failure to perform this duty will allow the power of the people for the support of the government to be diminished. For example, when the government confers upon a number of people, uniting themselves in corporate capacity, the privilege of limited liability, sound political science ascribes to the government the duty of seeing that the capital stock is all paid in and that it remains the corporate property. Again, when the government confers upon a number of persons, forming a corporate body, the power to do business by the will of a quorum and majority of them, sound political science requires the government to insure that the majority shall not so abuse this power as to deprive the individuals who happen to constitute the minority of any of their civil or political rights, as guaranteed to them by the constitution and laws of the country. Or, finally, when the government confers upon a corporate body the privilege of continued existence, regardless of change in personal membership, and thereby contributes towards making the body of shareholders a shifting body, the members of which will become largely unknown to each other and hence largely incapacitated from exercising any effective control over the officials of the corporate body, sound political science requires that government shall so control the relations between the officials and the rest of the shareholders as effectively to preserve and enforce the trust existing between them. If government does not exercise such powers and discharge such duties, it is easy to see how, through the device of the corporate organization, the few may despoil the many, and thus weaken the basis of popular government, if not of all forms of government.

But it is the corporations belonging to the other class that demand the more extended examination. These are the corporations whose pursuits are, either naturally or by the political system of the country in which they exist, governmental functions, either wholly or in part. Instead of exercising these functions through its own officials, government permits them to be exercised by private corporations. The reasons for such a policy are various and cogent. One of them, as distinctly stated by the Supreme Court of the United States in the noted Slaughter House cases, is that the interested vigilance of a private corporation is often more efficacious than the ordinary efforts of the officers of the law. Another reason is that through the employment of private corporations government may enlist private enterprise and private money, almost without limit, in the accomplishment of vast projects for the public good—projects which would be long delayed, if undertaken at all, should their accomplishment depend upon the means which government could command through taxation or loans. Another very cogent reason, from the point of view of political science, is that, through the management of private corporations engaged in such pursuits, most efficient education and experience in the science and practice of administration are acquired by a large number of private persons, from whose ranks the high officials of government may be taken. The country following such a policy is enabled to develop administrative talent and to hold it in readiness for official employment, thus escaping the necessity of recourse to bureaucratic discipline and the cultivation of the bureaucratic spirit.

Over this class of corporations sound political science demands, of course, a larger control by government than over the other class. In addition to those elements of supervision above mentioned, government must impose duties and restrictions corresponding to the additional powers and privileges bestowed. If government allows corporations to exercise the power of eminent domain, government must see to it that they take private property only for public purposes; that they pay a just compensation for it; and that all the machinery for con-

demnation, for ascertaining value and for securing the payment of the award shall be so constructed and employed as to preserve justice and the due process of law. If government allows them to engage in public business, *i.e.*, business which government itself has a right to carry on according to the existing political system of the country concerned, then government must see to it that they serve the public without discrimination. If government permits them to fix their own tariffs of charges, government must see to it that opportunity for effective competition is maintained. And if government confers upon them severally the rights of monopoly — that is, confers upon each of them the sole power to do a certain business within a given district and to prevent competition in that business within that district, then government must itself fix the maximum rate of charges.

So much, as to government's power, is clear from the point of view of political science ; but the law of this country has already gone much beyond this. Not only does it sustain the widest governmental regulation of private corporations engaged in enterprises which, according to the political system of the country, government itself may carry on ; but, according to the rule laid down in the noted case of *Munn vs. Illinois* by the Supreme Court of the United States, when any property is used in a manner to make it of public consequence, and to affect the community at large, it becomes clothed with a public interest, and must submit to control by the public for the common good. Upon this rule was based the decision that in this country the state legislatures have the power (1) to declare that any business which affects the community at large is clothed with a public interest, no matter whether or not government has put any money in it, or conferred any power on it ; and (2) to regulate such business, even to the point of fixing finally and without appeal the maximum tariff of charges which those engaged in such business may demand.

It was realized within a few years, however, that this decision attributed to the state legislatures the power to confiscate

the property of private corporations, especially such as were engaged in public or quasi-public pursuits, and that some of the legislatures were making good progress in that direction. In consequence of these experiences, the Supreme Court of the United States, by a series of decisions beginning with the case of the Chicago, Milwaukee & St. Paul R. R. Co. *vs.* Minnesota, so modified its earlier decision as to assert the power of the court to determine whether maximum rates fixed by a state legislature were reasonable or not, and to nullify them if, in its opinion, they were unreasonable.

From the point of view of the principles of political science, such complete control by government over private corporations is justifiable only on the principle that they are monopolies—that is, that they are furnished by government with powers to exclude competition. But in the recent Trans-Missouri Traffic Association case, it was decided by the Supreme Court that, while the state legislatures may deal with private corporations as monopolies and fix their maximum charges, Congress may, in all cases affecting interstate business, pass valid laws maintaining competition and forbidding any agreements between such corporations for the purpose of maintaining rates. Presumably the court would hold the same opinion in regard to the power of the state legislatures as to all internal business. It is now, therefore, the law of this country that government may not only fix the maximum tariff of charges for such corporations, but may also maintain competition between them, to any extreme it pleases.

In such a condition of the public law of the country, only the disposition on the part of the legislators is necessary in order to destroy the property of such corporations. It cannot be said that this disposition is wanting: apparently, it exists in great force. How much of it is feigned, and how much is real, it is impossible to know. But we do know that, in spite of our written constitutions and of all our judicial guaranties of property, the legislatures at last have their hands upon the throats of the corporations, and threaten the virtual confiscation of the vast properties in which hundreds of thousands of

our best citizens are interested. We do know that behind the legislatures are the party organizations, under the control of the chairmen of national, state and county committees, who are virtually without responsibility to any one, and who must procure, in some way, the means to keep their machines in repair and in operation. And we all believe, if we do not know, that these politicians understand, far better than we do, just when and where to put on the screws with the best result. In such a situation of affairs the corruption of government and party management is simply inevitable. The cause of it is not so much the cupidity of the corporations, as the unlimited power of the legislatures to do what they will with corporate property, and the unlimited power of the politicians to make the corporations pay continuously for their very existence.

Such is the labyrinth of difficulties which we have created for ourselves by allowing the different branches of government, and sometimes the same branch, to work at cross purposes, in endeavoring to solve the problem of the relations of government to the corporations. It is not easy to see the way out. In general, three possible ways of escape may be suggested. We may treat these corporations as monopolies and, while government fixes their maximum tariffs of charges, may allow them to exclude competition, so far as they can, by extension, contracts and agreements ; or government may maintain the opportunity for effective competition and allow the corporations to fix their own tariffs of charges ; or in some way a liberal maximum may be guaranteed to them and reasonable agreements allowed for regulating rates thereunder. Unless we can bring the law of the land into line with one or the other of these courses, I expect, though no longer a young man, to live to see the day when at least every corporation engaged in the vast transportation interests of this country shall be bankrupt, every legislature in the land a body of venal hirelings, and every party management a gang of blackmailers ; while the courts, to which we have been accustomed to look for protection against unconstitutional laws, will be bullied and intimidated until they yield in all important things to legislative encroach-

ments. Then we shall all be found ready, willing and eager that government shall take these vast properties at its own price and operate them by its own officials. The era of the socialistic republic will have arrived. The much-ridiculed Populists understand the present drift of things far more clearly than is generally supposed; and, whenever they observe any effort to change this drift, they are always in evidence to paralyze it. In fact, there has lately been ground for the conviction that the Populists are the only party among us who know exactly what they want and how to attain it. If the present attitude of the legislatures and the courts towards corporations is not playing into their hands, it is hard to see how this could be done.

It is from the point of view of liberty, finally, that the word which modern political science has to say in reference to corporations is most important—especially in reference to those corporations which do the work that government would otherwise be obliged to do. What we mean by liberty in political science is absence of government in a given sphere of individual or social action. We do not mean the rights of individuals as against each other—the great problem of private law; nor the freedom from sin and error involved in voluntary obedience to perfect law—the great problem of ethics: we mean, simply, immunity from the power of government.

Keeping this meaning of liberty in our minds, it is easy to see how corporations are a great stay against paternalism in government. Except for railroad, steamship and telegraph corporations, government would be obliged to own and operate all the great means of transportation and intercourse. Except for banking corporations, government would be obliged to own and operate all the great means for mediating exchange. Except for educational corporations, government would be obliged to own and operate universities and colleges. Except for art corporations, government would be obliged to own and manage academies, museums and collections. Except for eleemosynary corporations, government would be obliged to furnish the means for and administer charities. And, except for ecclesiastical corporations, government would be obliged to have religious

establishments. All of these things we must have, so long as we are civilized and progressive men ; and if we do not provide and manage them by private enterprise through the medium of corporations, government must and will occupy the ground.

Now, does modern political science favor this latter solution of this mighty problem ? I do not think that it does : in fact, I feel very sure that it does not. If it did, it would not be distinguishable from the political systems of the period just preceding the revolutions of the seventeenth and eighteenth centuries. In other words, if it did, the principles of popular government would be indistinguishable from those of absolutism. Modern political science favors the greatest possible limitation of governmental power, consistent with the sovereignty of the state, the unity, independence and security of the country, the enforcement of the laws and the maintenance of justice. It favors keeping open to private enterprise the widest possible domain of business. And it absolutely demands that all institutions, through which new truth is discovered and the ideals of advancing civilization are brought to light and moulded into forms for application, shall be so far free from governmental action as to secure and preserve, at least, perfect freedom of scientific thought and expression. In a word, modern political science is very suspicious of state socialism, as it is called.¹ Political science requires, moreover, that when government assumes any business previously pursued through the means and methods of private enterprise, government shall be obliged to show, first, that it has the authority to do so under the existing political system, and, second, that the welfare of the people will be subserved in higher degree by governmental than by private management. In all such cases, modern political science throws the burden of proof upon government, and will not yield to the mere demand of government for the experiment, without conclusive evidence of the harmfulness of the existing conditions, and of the truth of the proposition that no

¹ "Governmental socialism" is the better term, and I recommend to the economists the adoption of this nomenclature. It would deliver them from a good deal of difficulty in their reasoning.

other substitutes than the agencies of government can meet and rectify those conditions.

Of all forms of government, the federal republic is most hostile in principle to governmental socialism, and least likely to survive any extended development in that direction. The very essence of the federal republic is limitation of government, both as to the subject-matters upon which it may employ its powers, and as to the manner and degree in which it may exercise them. *Any* increase of such subjects and *any* removal of the limitations upon the manner and the degree of the exercise of powers are to be regarded as a menace to the principle of the federal republic; and, consequently, any radical movement of this sort may, from the point of view of political science, be pronounced destructive both of civil liberty and of federal republicanism. Modern political science—especially the political science of the modern federal republic—would, therefore, view with grave concern the destruction of private corporations and the assumption by government of any considerable portion of the business which they transact. While a governmental control, corresponding naturally in each case with the governmental powers conferred on corporations, may be safely exercised with reason and justice, their destruction, either directly or indirectly, would lead to a catastrophe in liberty and government which federal republicanism would hardly survive.

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